RECORD AND BRIEFS

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No. 16-373

IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
(202) 778 1800
agoldfarb@zuckerman.com

Counsel for Amici

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former federal district court judges who have experience adjudicating class action cases under securities and other laws. The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* are interested in this case because of their years of service to the federal judiciary and their ongoing commitment to ensure that federal judges have the means to manage their caseloads and dispense equal justice under law to all litigants.

Amici urge the Court to reverse the decision below and to hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to the three-year time limitation in § 13 of the Securities Act of 1933 for asserted class members.[2]

SUMMARY OF ARGUMENT

Securities class actions are among the most complicated and time-consuming actions that come before federal district courts. *See, e.g., In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013); *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). In the judgment of *amici*, the rule of

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] *Amici* take no position on the merits of this or other securities class actions.

American Pipe has had a salutary effect on management of securities class actions, and a substantial erosion of that rule would burden federal judges and federal courts without materially improving justice to the parties. In particular, *amici* envision an increase in "protective filings" if the decision below is affirmed. That is, a holding by this Court that the *American Pipe* rule does not apply to the three-year time limitation in § 13 of the Securities Act could cause unnamed class members in pending and future securities class actions to move to intervene in class cases, or file their own independent actions, simply to preserve their claims. These filings will complicate the already difficult process of choosing a lead plaintiff in a securities class action. They may also create competing factions of plaintiffs who may burden federal courts with duplicative filings and intra-party disputes. Further, a substantial increase in multidistrict litigations could ensue if unnamed class members choose to file independent suits in districts most convenient for them, but which might differ from the district in which the class case is proceeding. A single, consolidated class action could thus become subject to an MDL procedure that would expend more of the judiciary's time and resources than necessary. *Amici* also envision an increase in *pro se* filings by investors, which create special burdens for the court system. Applying *American Pipe* to § 13's three-year period (and similar provisions in the federal securities laws),[3] by contrast, will promote an orderly

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[3] This Court has likened § 13 to certain time-for-suit provisions in the Securities Exchange Act of 1934. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-61 (1991).

procedure through which the court can determine whether the claims are suitable for class-based relief, and manage the case thereafter toward a fair resolution based on the facts and the law.

ARGUMENT

I. FEDERAL SECURITIES CLASS ACTIONS PRESENT DIFFICULT CASE MANAGEMENT PROBLEMS.

Securities class actions present unique challenges that make them among the most difficult cases for federal district courts to manage. *Amici* are concerned about any change in class action procedure that threatens to exacerbate those difficulties.

In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress created a special set of procedures to govern a federal securities class action suit. The earliest stage of the case often is dominated by selection of a "lead plaintiff," a process intended to ensure that the litigation is managed for the class by an investor with a large financial interest in the relief sought by the class. *See* 15 U.S.C. § 78u-4(a)(3)(B). To ensure selection of an appropriate lead plaintiff, the plaintiff who files a securities class-action complaint has 20 days to "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class" of "the pendency of the action, the claims asserted therein, and the purported class period." 15 U.S.C. § 78u-4(a)(3)(A)(i). The notice also provides that any member of the purported class has 60 days to move the court to serve as lead plaintiff. *Id.*

These provisions were intended in part to encourage sophisticated institutional investors to serve as lead plaintiffs. *E.g.*, H.R. Conf. Rep. No. 104-369, at 34 (1995). The notices are not sent solely to institutional investors, of course; they are published in business media and are read by individual investors, financial advisors, and class-action lawyers, who must decide what action to take when they or their clients bought or sold securities in the defendant company during the relevant period.

Scores of these notices are available for review on sites such as Business Wire.[4] They typically provide a summary of the claims and the deadline for filing a motion to serve as lead plaintiff. Many also indicate that class members need not take any action to be a member of the class, and they invite class members to call the named plaintiff's law firm if they have questions. Law firms often form an ad hoc "group of persons" from the investors who contact them, and then move the court to appoint the group as lead plaintiff. *See Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 850-51 (S.D. Ind. 1999) (volunteers for lead plaintiff "are often collected by inviting investors who read the national notice under the PSLRA to send in a form to a law firm"); Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby,"* 61 VAND. L. REV. 543, 560 (2008).

In many cases multiple plaintiffs using different law firms file similar securities class-actions against

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[4] *See* Lawsuit News, Business Wire, https://www.Businesswire.com/portal/site/home/news/subject/?vnsId=31361 (last visited Mar. 6, 2017).

the same defendant. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 196 (3d Cir. 2005) (noting that 62 complaints were filed on behalf of the class); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1019 (N.D. Cal. 1999) (noting that 19 class actions were filed promptly after decline in stock prices). These competing complaints are often the subject of a motion for consolidation, which the district judge must adjudicate before appointing a lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(ii).

The appointment of a lead plaintiff is often contested by competing factions of plaintiffs. *E.g.*, *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 439-40 (S.D. Tex. 2002) (considering motions for appointment of lead counsel). District judges, consistent with the intent of the PSLRA, generally try to manage these early skirmishes by limiting the number of lead plaintiffs. *E.g.*, *Sakhrani*, 78 F. Supp. 2d at 854 (naming only one lead plaintiff—the individual investor with the largest losses during the class period); *compare In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 47 (S.D.N.Y. 1998) (concluding interests of the proposed class would be best served by a group of three co-lead plaintiffs). In *In re Baan Co. Securities Litigation*, 186 F.R.D. 214, 217 (D.D.C. 1999), for instance, the district judge observed that "a small committee will generally be far more forceful, effective and efficient than a larger aggregation." Consequently, "[t]he Lead Plaintiff decision should be made under a rule of reason but in most cases three should be the initial target, with five or six as the upper limit." *Id.*; *e.g.*, *Simmons v. Spencer*, No. 13 Civ. 8216 (RWS), 2014 WL 1678987 (S.D.N.Y. Apr. 25, 2014) (appointing two lead plaintiff

applicants, a total of six individuals, to serve as co-lead plaintiffs).

Many additional complexities arise after the lead plaintiff is selected. Motions to dismiss are filed in roughly 94 percent of securities class actions, Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* 21 (2017), *available at* http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf, and the heightened pleading standards under the PSLRA, which apply to fraud-based claims, often result in hotly contested disputes at the pleading stage. Moreover, those motions to dismiss often turn on whether plaintiffs have satisfied the PSLRA's requirement that, with respect to each allegedly fraudulent act or omission, they "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). Resolving that question often requires that the district judge take a hard look at the plaintiffs' allegations and, where appropriate, materials subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). If the case proceeds after the initial motions are resolved, the district judge must structure and monitor discovery, rule on a motion for certification, adjudicate motions for summary judgment, design and manage a trial (in the comparatively few cases that are tried), review and approve settlement agreements—including conducting fairness hearings—address objections from class members, and address questions of attorneys' fees. In high-stakes class actions, many of these events are intensely litigated. Others, such as

settlement and attorneys' fees, may not be contested at all, and the district judge must perform an independent analysis to ensure compliance with the letter and spirit of Federal Rule of Civil Procedure 23. *See generally* BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 1-3 (3d ed. 2010). District judges themselves may have duties to absent class members, particularly at the settlement stage. *See id.* at 12.

II. THE *INDYMAC* RULE FOLLOWED BELOW IS LIKELY TO INCREASE PROTECTIVE FILINGS.

In *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court concluded that the running of a statute of limitations should be suspended for the claims of absent class members during the pendency of a class action complaint. Each of those decisions was grounded in part on the concern that a contrary rule would induce potential class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553; *see also Crown, Cork & Seal*, 462 U.S. at 353-54. In essence, the *American Pipe* rule vindicates the case management principles embedded in Rule 23. As the Court observed in *American Pipe*, a "federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

Scores of appellate and district judges have endorsed that reasoning in securities class actions. *E.g.*, *Odle* v. *Wal-Mart Stores, Inc.*, 747 F.3d 315, 323 n.45 (5th Cir. 2014); *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000); *Police & Fire Ret. Sys. of City of Detroit v. Goldman, Sachs & Co.*, No. 10 Civ. 4429 (MGC), 2014 WL 1257782, at *8 (S.D.N.Y. Mar. 27, 2014). Indeed, this Court has consistently adhered to that reasoning, including in at least one case decided after *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-61 (1991). In *Devlin v. Scardelletti*, 536 U.S. 1 (2002), the Court noted that nonnamed class members are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Id.* at 10. "Otherwise," the Court added, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated." *Id.*

Over the decades the *American Pipe* doctrine crystallized into a settled expectation that potential class members need *not* intervene in a class action or file their own complaint to preserve their claims, at least until class certification has been denied. In 2002, the Fourth Edition of the leading treatise on class actions stated, "Because the filing of the class complaint tolls the statute of limitations for the class, class members may simply await the outcome of the suit." 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16:6, at 146 (4th ed. 2002) (footnote omitted). But by the time the Fifth Edition was published in 2013, that statement had become a "general rule" followed by 16 sections of

caveats and exceptions, as the lower courts considered the bewildering permutations of the *American Pipe* rule in the class action context. *See* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 9:53 to 9:68 (5th ed. 2013). The 2016 supplement adds a new section addressing the issue raised by Petitioner; the authors conclude with the observation that the dismissal of the writ in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), left "the split in the circuits to be resolved another day." *Id.* § 9:69, at 58 (Supp. 2016).

In *IndyMac*, the Second Circuit held that the *American Pipe* tolling rule does not apply to § 13's three-year period. 721 F.3d at 101. In the decision below, the court of appeals followed *IndyMac* to dismiss claims that the plaintiff had filed, after opting out of a putative class action, outside of § 13's three-year period. Pet. App. 1a-6a. If upheld by this Court, the *IndyMac* rule will contribute to the growing confusion about *American Pipe* tolling in class action cases. The effect, *amici* believe, will be a trend toward duplicative filings in securities class action cases, which will complicate their management and administration. *Amici* believe this based on their experience and judgment, for the following reasons.

First and foremost, potential class members will have a strong incentive to file motions to intervene or separate complaints to ensure that any time limitation characterized as a "statute of repose" is not later held to bar their claims. One research firm reports that the median time from the filing of a

securities class action complaint to a decision on class certification is about 2.5 years. Boettrich & Starykh, *supra*, at 23. (The median time between the end of the class period and the filing of the first complaint is only 13 days, but the mean is 69 days. *Id.* at 18.) Another researcher reports that the median time to settlement was three years in 2015, with longer periods for larger cases. Cornerstone Research, *Securities Class Action Settlements – 2015 Review and Analysis* 19 (2016), *available at* http://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf. Thus, sophisticated parties know that a three-year statutory period may expire well before the rights of absent class members are adjudicated. Indeed, under the rule followed by the court of appeals below, even if a class is certified within the three-year period, absent class members are not protected if the class is later *decertified* outside the three-year period.

The Second Circuit appears to embrace, or at least be agnostic to, the prospect of multitudinous, duplicative litigation resulting from potential class members' filing motions to intervene or separate actions to protect their rights. As the court put it in *IndyMac*, "through minimal diligence, [the proposed intervenors] could have avoided the operation of the Section 13 statute of repose simply by making timely motions to intervene in the action as named plaintiffs, or by filing their own timely actions and, if prudent, seeking to join their claims under Federal Rule of Civil Procedure 20 (joinder)." *Id.* at 112. *Amici* believe that such a regime would place an undue

burden on district courts, and is both unwarranted and undesirable.[5]

Second, as a result of the PSLRA's publication requirement, potential members of securities class actions may receive early notice of the litigation and ready access to counsel. Federal securities class actions are filed and litigated by a plaintiffs' bar that tends to be sophisticated and highly competitive. These lawyers stay abreast of major events in the capital markets, and they are immediately made aware of class action complaints filed by competing plaintiffs' firms. When a securities class action is filed, plaintiffs' lawyers have an obligation, as well as an incentive, to notify potential class members of the action. Many of these potential class members contact one or more of the plaintiffs' firms who are competing to represent the lead plaintiff. Even before the court of appeals' decision in *IndyMac*, law firms representing investors have sometimes "signed up"

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[5] *Amici* note that, in the Sixth Circuit, the incentive for potential class members to act before the statute of limitations runs, either through early intervention or filing a separate action, is particularly acute. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016), the Sixth Circuit followed *IndyMac*. However, that circuit has also declined to extend *American Pipe* tolling to a potential class member who files her own action beyond the statute of limitations but before the trial court rules on class certification. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005). As the court recognized in *Stein*, to protect her rights in the Sixth Circuit, a potential class member currently must either file before the limitations period expires or hope that the district court decides class certification before the "statute of repose" period runs. 821 F.3d at 795 n.6. Any rational potential class member will choose the former, which will lead to more protective filings.

thousands of potential class members as part of the initial process of choosing a lead plaintiff. *See, e.g.*, *Network Assocs.*, 76 F. Supp. 2d at 1019 (noting that one law firm claimed to represent a group of more than 1,725 investors, and another claimed over 100 institutions and "thousands" of individuals); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1154 (N.D. Cal. 1999) ("groups as large as 4,000 plaintiffs strong are vying for appointment" as lead plaintiff); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1135 (C.D. Cal. 1999) (two competing groups of "several hundred investors"); *In re Baan Co.*, 186 F.R.D. at 217 (group of 466); *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 408-09 (D. Minn. 1998) (roughly 300). If the *IndyMac* rule followed below prevails, it seems likely that plaintiffs' counsel will need to inform potential class members that they *cannot* merely sit by and assume that their rights are protected.

Third, many securities are held through funds operated by professional managers. Investment managers are fiduciaries who have a duty to keep investors informed of rights and opportunities associated with their investments. *See* RESTATEMENT (SECOND) OF TRUSTS § 177 (1959) ("The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."). As a result, they are likely to monitor Business Wire and other sites that publish notices of class action filings. After learning of a class action involving securities held by their investors, investment professionals may feel obligated to tell their clients that they should analyze the pleadings to form a legal judgment about whether intervention is advisable. At minimum, this imposes additional costs on investors,

and it could impose substantial burdens on the courts if investment professionals push investors to protect their rights by filing complaints or motions to intervene.

Finally, a lead plaintiff in a securities class action owes a fiduciary duty to the class. *In re Cendant*, 404 F.3d at 198. Class counsel likewise owes a fiduciary duty to putative class members upon the filing of a class complaint. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). Whether that duty extends to notifying class members about the possible imposition of a time bar is not clear, but again, under the *IndyMac* rule the safer course for a fiduciary may be to notify class members that their claims are not protected against the time limitation unless they file a complaint or motion to intervene. Such an outcome would impose additional costs on plaintiffs or their counsel, who must pay for such notice. Also, adding another notice obligation to those required by the PSLRA and Rule 23 may confuse potential class members about the substance and import of the different notices they receive during a securities class action.

To be sure, under the *IndyMac* rule putative class members could still delay filing a complaint or motion to intervene until just before expiration of the three-year period. However, plaintiffs may decide that the wiser course is to make a protective filing early in the case, rather than monitor the litigation, calendar key dates, and form periodic judgments about whether intervention is advisable. In any case, motions to intervene and separate complaints substantially burden the courts, regardless of whether they are

filed shortly after a complaint or immediately before the expiration of a limitations period.

Amici cannot say how many additional motions to intervene or separate complaints will be filed if the *IndyMac* rule followed below stands. Under the *American Pipe* rule regularly applied prior to the Second Circuit's decision in *IndyMac*, however, virtually none of these putative class members file papers with the court or otherwise participate in the proceedings if they are not selected as lead plaintiff. They have had little reason to do so in light of the longtime understanding that their claims would not be extinguished while the class action proceeds.

III. APPLYING THE RULE OF *AMERICAN PIPE* WOULD MINIMIZE CASE MANAGEMENT ISSUES AND PROMOTE A FAIR RESOLUTION OF SECURITIES CLASS ACTIONS.

As noted *supra*, district judges presiding over securities class actions frequently conclude that the interests of justice and efficiency are served by limiting the number of representative plaintiffs. In *In re Telxon Corp. Securities Litigation*, 67 F. Supp. 2d 803 (N.D. Ohio 1999), for instance, 27 parties filed class action complaints. All agreed that the cases should be consolidated, but three groups competed for lead plaintiff status. One group consisted of 18 individual plaintiffs who alleged collective losses of some $3 million during the class period. Although this amount exceeded the loss of the other candidates, the court declined to name the group as lead plaintiff, reasoning that "[t]he larger the group, the less incentive any single member of the group—

and certainly the group as a whole—will have to exercise any supervision or control over the litigation." *Id.* at 815. Moreover, the court added, "[t]he greater the number of persons comprising the group, the more difficult it is for those persons to communicate with each other, and to speak with a single, coherent voice when making decisions about the conduct of the litigation . . . ." *Id.* at 815-16; *see also In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 267 (3d Cir. 2001) ("At some point, a group becomes too large for its members to operate effectively as a single unit."); *Enron*, 206 F.R.D. at 442; *Burke v. Ruttenberg*, 102 F. Supp. 2d 1280, 1336-37 (N.D. Ala. 2000) ("the larger the group, the greater the costs"), *vacated on other grounds*, 317 F.3d 1261 (11th Cir. 2003).[6]

If the Second Circuit's approach to § 13 is sustained, the problem in finding a "single, coherent voice" for the class could become more difficult. The *IndyMac* court foresaw two options for absent class members to preserve their claims: filing a separate complaint (and possibly moving for joinder), or filing a timely motion to intervene. *See* 721 F.3d at 112. Few *pro se* investors have the training and experience to draft a complaint that satisfies the PSLRA's

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[6] To be sure, a number of courts have allowed multiple parties to serve in a group as lead plaintiffs. But these cases appear to turn on the cohesiveness of the group. *See, e.g., In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638 (W.D.N.C. 2000). When there are "multiple groups of plaintiffs and institutional investors all vying against each other for appointment as lead plaintiff," then "concerns regarding control of the litigation vis-à-vis the best interests of the class members [are] a relevant inquiry." *Id.* at 643.

standards. *See* 15 U.S.C. § 78u-4(b)(1)-(2); *Tellabs*, 551 U.S. at 313 ("The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter ...."). Moreover, the fee for filing a complaint in federal court is currently $400—a significant impediment for someone who is simply trying to preserve a claim—whereas there is no fee for filing a motion to intervene. It thus stands to reason that putative class members would be more likely to file motions to intervene.

But motions to intervene are themselves subject to a complex procedure and analysis, and adjudicating scores of them in the class action context could consume substantial resources of the court and the parties. The motion must "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." FED. R. CIV. P. 24(c). The movant must meet the standard for intervention, of right or permissive, under Rule 24(a) or (b), respectively. *E.g.*, *DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 942-43 (10th Cir. 2005).[7] Although motions to intervene tend to be granted liberally in class actions, defendants can and do oppose them, and the

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[7] Under Rule 23(c)(2)(B)(iv), for classes certified under Rule 23(b)(3), the notice provided to class members after class certification must include a statement that "a class member may enter an appearance through an attorney if the member so desires." This does not mean, however, that absent class members have an automatic right to intervene in Rule 23(b)(3) classes. *See* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799, at 252-53 (3d ed. 2005).

case law reflects the many issues that can arise. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 276-79 (D.N.J. 2000) (movant not member of class and thus could not intervene as of right, although permissive intervention granted for limited purpose), *aff'd*, 264 F.3d 286 (3d Cir. 2001); *In re Initial Pub. Offering Sec. Litig.*, 499 F. Supp. 2d 415 (S.D.N.Y. 2007) (intervention to challenge lead counsel would cause undue delay); *Jenkins* v. *Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996) (no intervention as of right in civil rights class action when named plaintiffs were adequately representing interests of proposed intervenors); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005) (the "goals of Rule 23 would be seriously hampered" if absent class members "who merely express dissatisfaction with specific aspects of the proposed settlement . . . have the right to intervene").

That many of these putative intervenors are likely to be *pro se* will add to the case management difficulty. In any proceeding, *pro se* parties consume more than their share of judicial and administrative resources. They are often unfamiliar with electronic case filing and local and federal rules designed to expedite litigation; they are difficult to notify; and their papers often must be reviewed with a heightened degree of interpretive leniency, *see, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). *See* J. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306-09 & nn. 5-19 (2002) (discussing judicial and administrative problems with *pro se* cases). In a complex class action, managing an influx of *pro se* motions to intervene or

separate complaints could occupy substantial judicial resources. Handling *pro se* matters is part of a federal court's function, of course, but it hardly seems a good use of resources when the *pro se* parties' interests are already represented by counsel specifically chosen for their expertise.

The *IndyMac* rule followed below also could complicate discovery and other procedural aspects of litigation that are sometimes awkward and cumbersome in class actions. Typically, discovery from absent class members is "disfavored" (although not flatly prohibited), in part because such discovery would "threaten[] to undermine the efficiency of representative litigation." *See* 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 9:11, at 419, 417 (5th ed. 2013) (footnotes omitted). The test for permitting discovery from absent class members is itself complex and nuanced, and frequently disputed. *See id.* §§ 9:12-9:17, at 420-429. But even absent class members "can lose their effective immunity from most discovery by becoming actively involved in the litigation." *Id.* § 9:12, at 423. Class members who intervene or file their own complaints presumably would be subject to the full range of discovery devices, just as they could utilize those devices offensively to develop their cases. *See* 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2007), at 611 ("the intervenor is entitled to litigate fully on the merits once intervention has been granted"). Many proposed intervenors would have little interest in propounding discovery, but they will incur considerable cost and risk if, for instance, they are obligated to make initial disclosures under Rule 26(a) and respond to

interrogatories under Rule 33 or document requests under Rule 34.

In addition, courts often treat absent class members differently from class representatives with respect to counterclaims—a wrench in the class action machinery. Many courts disfavor counterclaims against absent class members for case management and other reasons, including questions of personal jurisdiction over absent members. 3 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS §§ 9:24-9:28, at 456-77. By contrast, courts often permit (and may even require) counterclaims against representative parties. *See id.* § 9:29, at 478-81. If absent class members feel impelled to intervene or file separate complaints to preserve their claims, class action defendants will likely react by filing counterclaims against the intervening plaintiffs, where warranted. This can only complicate the litigation for both the parties and the courts.

Finally, the Second Circuit's rule, if upheld, may require district courts to give additional scrutiny to the timing and content of notices required under Rule 23. Members of a class certified under Rule 23(b)(3) must receive notice that the court will exclude from the class any member who requests exclusion. FED. R. CIV. P. 23(c)(2)(B)(v). Likewise, a court may refuse to approve a potential settlement of a class action with a certified Rule 23(b)(3) class unless the proposed settlement "affords a new opportunity to request exclusion to individual class members" who previously did not do so. FED. R. CIV. P. 23(e)(4). Given that one or both of these notices may, and often do, occur after the three-year period in § 13, courts will need to consider whether to accelerate the pace of

securities class action litigation to ensure that any Rule 23 notice occurs in time to make a class member's opt-out rights meaningful. At minimum, when notice goes out to a class beyond the three-year period in § 13, a district court will need to assess whether the notice must alert class members that opting out of the class would end any chance for recovery under the Securities Act because those rights have expired.

Amici reiterate that they are neutral about the substantive issues of securities law raised by the parties in this litigation. Based on their collective experience and judgment, however, *amici* believe that this Court's endorsement of the *IndyMac* rule followed in the decision below would exacerbate district courts' administrative and judicial difficulties in managing securities class actions.

CONCLUSION

For the reasons stated, the Court should reverse the decision below.

Respectfully submitted,

ANDREW N. GOLDFARB
Counsel of Record
GRAEME W. BUSH
JOHN J. CONNOLLY
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Ste. 1000
Washington, DC 20036
202 778 1800
agoldfarb@zuckerman.com

APPENDIX

APPENDIX

List of *Amici*

The Hon. Frank C. Damrell, Jr. (ret.) served on the United States District Court for the Eastern District of California from 1997 to 2011. He served on the Judicial Panel on Multidistrict Litigation from 2008 to 2011. Judge Damrell is currently a principal at Cotchett, Pitre & McCarthy LLP.

The Hon. William Royal Furgeson, Jr. (ret.) served on the United States District Court for the Western District of Texas from 1994 to 2013. He served on the Judicial Panel on Multidistrict Litigation, was President of the Federal Judges Association, and was a member of the Judicial Branch Committee of the Judicial Conference of the United States. Judge Furgeson is currently Dean of the University of North Texas at Dallas College of Law.

The Hon. Nancy Gertner (ret.) served on the United States District Court for the District of Massachusetts from 1994 to 2011. Judge Gertner is currently a Professor of Practice at Harvard Law School.

The Hon. G. Patrick Murphy (ret.) served on the United States District Court for the Southern District of Illinois from 1998 to 2013, including serving as chief judge from 2000 to 2007. Judge Murphy is currently a partner at Murphy & Murphy, LLC.

The Hon. T. John Ward (ret.) served on the United States District Court for the Eastern District of Texas from 1999 to 2011. He served on the Judicial Conference Committee on Court Administration and Court Management from 2003 to 2009. Judge Ward is currently a partner at the Ward & Smith Law Firm.

The Hon. Alexander Williams, Jr. (ret.) served on the United States District Court for the District of Maryland from 1994 to 2014. Judge Williams is currently on the faculty of the Howard University Law School.